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ABSTRACT

Recent Supreme Court decisions have fundamentally altered the attorney's right to advertise. This potentially revolutionary revision in prescribed professional communications has paradoxically had ambiguous results. Despite the freedom to advertise, most attorneys forego this opportunity to maximize profits, expand clientele, or merely enhance their images. Although there are promising signs that more attorneys might use public relations or advertising techniques, most attorneys have not taken advantage of promotional opportunities afforded by the Bates v State Bar of Arizona. Few lawyers take advantage of their opportunity to advertise, although it would benefit them, their profession, and consumers. One thing is absolutely certain--legal advertising works. There are at least two Constitutional justifications for allowing unrestricted legal advertising: the First Amendment's protection for freedom of speech, and the right to counsel contained in the Sixth Amendment. Finally, fears about unprofessional advertising should not deter legal advertising because the benefits outweigh the drawbacks. Still, these conclusions must be qualified somewhat. First, caution is warranted because of the recency of issues and cases involved. Second, numerous authors have confused terms like public relations, advertising, marketing, and promotion. (Seventy notes are included.) (MS)

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Practical and Constitutional Implications of Legal Advertising

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Practical and Constitutional Implications of Legal Advertising

Recent Supreme Court decisions have fundamentally altered the attorney's right to advertise. This potentially revolutionary revision in prescribed professional communications has paradoxically had ambiguous results.

Despite the freedom to advertise, most attorneys forego this opportunity to maximize profits, expand clientele, or merely enhance their images. This essay examines the Constitutional restrictions and endorsements upon legal advertising, while also recognizing the numerous benefits accruing to clients, attorneys, and the legal profession. Additionally, we'll consider reasons for attorney recalcitrance to promote their services.

Practical and Constitutional Implications of Legal Advertising

The recent relaxation of restrictions upon attorney advertising by the United States Supreme Court decision in Bates v State Bar of Arizona has paradoxically had polar consequences.[1] The prior status quo of barriers to legal advertising and promotion has been dramatically altered, yet ironically things haven't changed that much.[2] Clearly, this is an involved and multifaced public policy consideration.

Detailed discussion of the Bates decision isn't necessary, because numerous authors have provided that analysis.[3] This research provides a comprehensive post-Bates update on the status of attorney advertising. Five particular topics will be explored: 1) extent of attorney advertising; 2) practical considerations favoring lawyer advertising; 3) constitutional justification for attorney advertising; 4) style and good taste; and 5) caveats.

The propriety of legal advertising is a current controversy in the legal community. Few issues are as important to the profitability and outcome of the legal profession and its individual practitioners. The ultimate purpose of this analysis is to advance our understanding of the prospects for legal advertising.

Extent of Attorney Advertising

Have attorneys taken advantage of the promotional opportunities afforded by the Bates decision in 1977? A decade later, the answer is a qualified "no," although there are promising signs that more attorneys might use public relations or advertising techniques.

In 1980, Victor noted that a recent American Bar Association Journal poll discovered negligible attorney interest in advertising. Only 3% admitted advertising, while 84% "stated that they never will."[4] A year later, another ABAJ poll found that lawyers' use of advertising "has increased only modestly to 10 percent."[5] About the same time, the Research Group's "Study

on Institutional Advertising" concluded that; "A large number of lawyers apparently have serious reservations about the appropriateness and professionalism of either individual or institutional lawyer advertising."[6]

Goldstein noted these poll data and other evidence in his 1982 article. He asserted; "Most lawyers still associate advertising or self-promotion with hucksterism. A majority exhibit an instinctively negative reaction to any form of self-promotion."[7] Goldstein added that a majority of attorneys disbelieve that advertising can be dignified and undemeaning.[8]

A 1983 study of television advertising by attorneys also found little activity. According to Middleton, only 13% of a sample reported that they had advertised.[9] Taken collectively, these data seem to suggest serious underutilization of the freedom to advertise by attorneys.

However, this is not as incontrovertible a fact as one might initially believe. On the contrary, there is reason for optimism about the expansion of legal advertising.

In 1984, Kaufman put the resurgence of legal advertising in historical perspective; "Until the turn of the century, lawyers did advertise. Since 1977, in slowly increasing numbers, lawyers are beginning to do so again.[10] A year later, John Dickason perceived continual growth in attorney advertising; "We have a maturing teenager...It's going to be with us and be more and more accepted."[11]

"The growth has been phenomenal," said Michael Smythe of the Television Bureau of Advertising with respect to attorney use of television ads.[12] Gary Greer, a managing partner at Denver's Sherman and Howard law firm in 1984 observed that "a firm brochure is now de rigeur."[13] One marketing consultant reports more than 60 law firm clients.[14]

Practical Considerations Favoring Attorney Advertising

Despite promising signs of a more progressive future, it must be concluded that too few attorneys advertise today. This is an ironic omission, because they are one of the groups likely

to benefit from increased legal advertising; the legal profession as an institution and the general public are the other beneficiaries. One practical consideration remains to be mentioned--legal advertising is effective.

Individual attorneys need to advertise, to ensure financial survival. According to a 1984 article by Richard Greene in Forbes; "American lawyers are headed for serious financial trouble. Their golden age is coming to an end. This pampered, protected profession is feeling the bite of unaccustomed competition."[15]

"Competitive pressures are forcing lawyers to become businessmen," claimed Martindale-Hubble law directory publisher executive Michael Magness. His conclusion was a gloomy prediction; "The lawyer who doesn't become a good businessman isn't going to make it."[16]

Why do Greene and Magness portend such negative prospects for the legal profession? The root cause of the problem is a surplus of attorneys. In economic terms supply will soon far exceed demand. Greene observed; "Much of today's trouble stems from one simple fact: there are too many lawyers chasing too few clients. The statistics are numbing. There were only 355,000 lawyers in the US in 1970. There are 622,000 now (1984) and there will be over 1 million by the middle of the next decade. The number of lawyers is growing much faster than the business available to support them."[17]

The solution to an imbalance between excess supply and insufficient demand is to increase demand. This can be accomplished most effectively through advertising. There is reason to believe that there is an untapped market for legal services, and that enhanced communication might provide the impetus for greater utilization of legal services.

A recent essay in the Harvard Civil Rights-Civil Liberties Law Review advanced this notion; "The primary obstacle to increased middle class utilization of legal services is simple ignorance of the availability, type and cost of such assistance.

Presumably, greater publicity would not only remedy this ignorance, but also improve public attitudes about the legal profession, further reducing the reluctance of people to seek legal advice when necessary."[18]

Not only do individual attorneys need to advertise to attain a sufficient caseload, but the profession as a whole needs to enhance its image with the general public. Attorneys are not held in the highest esteem in American culture as they once were. Again, the most evident solution involves effective application of public relations techniques.

The diminished respect for attorneys so prevalent of late was documented by the Final Report of the Research Group. It argued; "The public is highly critical of lawyers' fees and ethics. There is strong sentiment among the public that lawyers overcharge and that attorneys are generally more interested in maximizing their incomes than in serving their clients."[19]

Not only would individual attorneys and the profession as an institution benefit, but consumers also stand to profit from increased attorney advertising. Lower prices should result from effective legal advertising.

One recent Canadian study on this subject arrived at staggering statistics; "The authors estimate that for 1970, the aggregate costs to consumers in Canada of restrictions on lawyers' advertising were $33,000,000."[20] This occurred because "restrictions on competitive advertising in the professions restricts price competition and enhance professional incomes to the detriment of the public."[21]

The same situation appears to be true in the United States as well. The Washington Post noted in 1978 that "there are strong indications from around the country that lawyer advertising is lowering the cost of everyday legal services."[22] Similarly, the chairman of the ABA Commission on advertising notes that prices for "routine legal services" drop when some attorneys advertise.[23]

Empirical validation of the relationship between legal advertising and lower consumer prices has been published. In 1978, McChesney and Muris reported their research findings; "We conducted a case study of a legal clinic that has 24 offices in Southern California and recently owned 12 in the New York metropolitan area. It is a heavy user of advertising. The results of that study indicate that, despite charging lower prices, the clinic does not provide a lower quality of service. In fact, on some measures of quality, the clinics' services are demonstrably better."[24]

Legal advertising, then, seems to offer distinct benefits to individual attorneys, the legal profession as an institution, and consumers. One pivotal question remains to be answered -- does it work? Do advertisements for legal services produce the desired outcomes? If not, then potential benefits will never be realized.

Fortunately, considerable research has been conducted to measure the efficacy of legal advertising. Although there is tremendous diversity in those studies, and while there is no consensus of methods or outcome, there is one inescapable conclusion -- legal advertising works.

Three reports of successful legal advertising surfaced early in the 1980's. Victor reported that one New York firm developed 150 new clients as a result of a four-week television ad campaign.[25] This television campaign followed an unsuccessful newspaper advertising campaign.[26]

In Missouri, The Committee on the Delivery of Legal Services was formed to study and recommend solutions to barriers confronting citizens of Missouri seeking legal services. According to the Missouri Bar Association; "Important findings of this survey show: 1) that the use of paid advertising in newspapers and on radio and television is an acceptable and effective method by which the bar can educate the public concerning its legal needs. Sixty percent of the persons

interviewed like the legal ads and many considered them to be a public service."[27]

The proverbial bottom line for any firm is, of course, profit. According to the National Resource Center for Consumers of Legal Services, "it pays to advertise," in the words of staff attorney William Bolger.[28]

"Perhaps the most startling conclusion was that responding lawyers made an average of $7.93 in fees for each dollar spent on advertising," the study concluded.[29] No firm received less than twice that was invested in advertising.[30]

A statewide study of the effectiveness of legal advertising was conducted in Ohio between 1978 and 1979. Specifically, the researchers sought to measure awareness, recall and comprehension variables. Again, it was determined that attorney advertising works; "The survey data was useful and indicated that the advertising messages were seen or heard by a significant number of people and were viewed favorably...approximately 15% of those surveyed had unaided recall of the Ohio State Bar Association advertising and approximately 40%-60% had aided advertising recall."[31]

Numerous instances of successful individual attorney or firm ad campaigns can be cited. For example, Cawley, Schmidt and Sharrow "brought in 1,200 new cases a month through advertising."[32] Similarly, "the response to Gary Gallo's initial advertising was so positive that he has gone from one office last year to three now, and plans to open two more in the near future."[33]

Another bar association study, this time in Illinois, corroborated what by now may seem like a foregone conclusion. The Public Awareness Committee of the Maryland State Bar Association reviewed the Illinois experience and noted; "Advertising increased the number of people who had wills by 7% of the Peoria population. If this result is only duplicated in Maryland, nearly $10,000,000 in legal fees for 98,000 new wills would be generated by an advertising expenditure of $285,000.[34]

These results replicate the spirit of earlier research in Illinois. A 1977 study by the Illinois State Bar Association evaluated a three-week advertising campaign utilizing television, radio and newspapers. The study found; "71% of the respondents remembered the television ads while only 39% recalled reading the same ad in newspapers."[35]

Numerous individual attorneys have proclaimed publicly the success of their advertising efforts. In 1982, New York state attorney John Mahon declared; "Advertising has definitely helped and our business will continue to increase as a result of it."[36] Mahon's firm restricts its communications to weekly newspapers and church bulletins, since wills and estates are the services being marketed.[37] Another Empire State attorney, Jack J. Sissman, "is convinced that advertising enabled him to capture a share of clientele he would not otherwise have had."[38]

Examples from other parts of the country confirm these New York State instances. In Milwaukee, Wisconsin, partner Robert Habush of Habush, Habush and Davis, launched an expensive television advertising campaign.[39] Habush retained an advertising firm to conduct pre-production opinion polling and assist in video production.[40] The campaign succeeded; according to Habush, "it fortified our clientele."[41] He added; "It institutionalized the law firm -- it isn't me, it's the firm that people remember. It's Habush, Habush and Davis -- the name -- that's getting out so much. When they think of lawyers -- of law firms -- they think of Habush, Habush and Davis."[42]

A final success story should be cited, that of Calkins Kramer of Denver. An extensive marketing program called MICORP was used, with impressive results. The firm received "some $700,000 in new cross-sold business...generated in the eight months of the push, which amounts to about seven percent of the firm's annual revenue -- all at a cost, in payments to MICORP and other expenses, of about $250,000 over 20 months."[43]

Constitutional Justification for Attorney Advertising

Paradoxically, few attorneys advertise, although it would prove profitable if they did. Despite the Supreme Court's endorsement of the right of attorneys to advertise, subsequent state legislation and court decisions have eroded the First Amendment victory embodied in the Bates decision.

There appear to be two Constitutional issues involved in a discussion of attorney advertising.[44] The First Amendment's guarantee of freedom of speech is one issue in this case, and the Sixth Amendment's right of selection of counsel's implied right to receive information is the other. Simply put, attorneys have a Constitutional right to communicate commercial messages, and potential consumers have a Constitutional right to receive commercial messages.

First Amendment rights

Attorneys ought to be afforded the same protections for commercial speech as anyone else. There is no Constitutional justification for restrictions on lawyer advertisements, but there is substantial warrant for elimination of such restrictions.

Justice Harry Blackmun wrote the Bates decision, declaring the Constitutional acceptability of "truthful advertisement concerning the availability and terms of routine legal services."[45] Thus, the Bates ruling was intended to facilitate attorney advertisements. Opposite consequences, however, have been noted; "It is ironic that some of the rule amendments adopted since the Bates case, presumably to allow increased commercial communication from lawyer to potential client, are to restrictive that they would not allow the very ad at issue in Bates."[46]

Whatever the empirical results of the ruling, the intent was clear. Andrews noted; "Lawyers have a Constitutional right to advertise in print their prices for routine legal services."[47] She cited Blackmun in the Bates opinion; "Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an

indispensable role in the allocation of resources in a free enterprise system."[48]

Sixth Amendment rights

Americans charged with criminal offenses enjoy a right to counsel. It has been argued that this right to adequate defense implies a right to gather information likely to optimize choices regarding legal services. Seen from this perspective, the Sixth Amendment's right to counsel necessitates the provision of information about potential providers of legal services.

"The Supreme Court's decision in Bates recognizes that attorney advertising is essential if consumers are to make free, informed choices," Shanahan declared in 1981.[49] Walker reasoned similarly; "But the right to legal representation and the right to know about possible services through advertising seem inexorably connected."[50]

Justice Blackmun did address this specific issue in his opinion. He wrote; "The listener's interest is substantial; the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."[51] A later, related Supreme Court decision, Central Hudson v Public Service Commission, also recognized the Constitutional issue; "Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all."[52]

One thing is clear. While the Bates decision meant to convey Constitutional protection to attorney advertising, the results have been inconsistent. Greenwald observed; "Although the Supreme Court's decision in Bates granted first amendment protection to the commercial speech of attorneys, questions still remained as to exactly what kind of speech could be afforded protection, and in what contexts."[54]

The ambiguity of the Bates decision was intentional; the Court sought to issue a narrow verdict. Justice Blackmun called the issue before the Court "a narrow one."[55] Presto concluded

that "much authority supports the conclusion that the ultimate holding in Bates was limited."[56] Additional litigation will be necessary before any more definitive analysis of the Constitutional aspects of attorney advertising is possible.

Style and Good Taste

Although there have been numerous objections raised to attorney advertising, none has been argued more frequently than the fear that poor style and bad taste may produce unprofessional images in the minds of potential customers.[57] There is certainly nothing wrong with the desire to maintain a professional image, but it must be noted that these fears of attorneys are needless. It is quite possible to conduct highly dignified and eminently professional advertising; indeed, there are diverse pressures within and outside the legal community to enforce standards of style and taste.

"Critics suggest that advertising will undermine the legal profession's sense of dignity and encourage a decline in the quality of services. Admittedly, some advertising is undignified and arguments have been made that mass marketing techniques promote short-term considerations," noted Mitchell in 1982.[58] Others, both attorneys and scholars, have corroborated Mitchell's perceptions.

The Supreme Court in the Bates case considered the adverse impact of advertising upon the dignity of the legal profession. According to Scott; "The Arizona bar argued that price advertising would have an adverse effect on legal professionalism;" the Supreme Court disagreed.[59]

The internal pressures of peer perception can be formidable. Victor realized this; "Conversely, others feel that the competent ethical, most successful lawyers will not resort to advertising because they will deem it unprofessional, misleading, and deceptive."[60] As one successful New York state attorney declared; "Most lawyers who advertise are not well-positioned in the profession. I find it hard to conceive that any lawyer who

enjoys the respect and patronage of his colleagues would advertise."[61]

It would be fair to state that a major barrier to legal advertising involves fears of unprofessional ads. While the possibility of unprofessional ad campaigns is ever-present, as any viewer of local television advertisements will surely admit, it is not inevitable or necessary.

If an attorney wishes to present a professional public image, there are numerous sources of assistance. Legal seminars, sometimes under the auspices of the ABA or State Continuing Legal Education Programs, occasionally offer promotional advice.

Consultants are available of course. The Association of Behavioral Trial Consultants, founded by Ron Matlon and other speech communication specialists in legal communication, can offer assistance in finding a local consultant. Legal journals like ABAJ, Barrister and many others include advertisements by various specialists including communication consultants.

Another source of public relations and advertising assistance lies in local public relations counsel and advertising agencies. The Yellow Pages provide complete information on how to contact these firms; then it is up to the attorney to determine if the firm is the right one to handle public relations and advertising needs.

Attorneys who advertise, although comparatively few in number, have recognized the benefits of professional communication advice. According to "the two most famous users of lawyer advertising in California, The Los Angeles-based national Legal Clinic of Jacoby and Myers and the Bay Area firm of Yanello and Flippen...the services of an advertising agency have been crucial to the success of their businesses."[62]

While there are pitfalls of bad style and taste awaiting the legal advertiser, these can be voluntarily avoided through retention of a communication consultant. Not all attorneys who choose to advertise, however, will select professional assistance. Still, there are checks and regulators in the

marketplace and the law. Besides, most ads are in good taste -- few are truly bad.

"Although a few attorneys have been known to try novel approaches to advertising...the majority of those advertising seem to be sticking to conventional print and electronic media."[63] There is reason for accepting Anderson's conclusion about most ads being relatively conventional. There are pressures on lawyers who advertise to maintain good taste; "Wherever advertising bans have been lifted, bar associations and law societies have instituted regulatory rules. These rules, and in many cases the law as well, prescribe false and deceptive advertising."[64]

The Supreme court has protected legitimate First Amendment interests while indicating what is unprotected. According to the Court; "False, fraudulent, and misleading advertising could be restricted."[65] Additionally, "The time, place, and manner of lawyer advertising, like that of other commercial speech, could be subject to reasonable regulations."[66]

There is no reason to fear unprofessional ad campaigns, because there are laws and professional society regulations barring such behavior. As a result, improper behavior is usually deterred; "Deceptive lawyer advertising will be deterred by business self-interest, by legal sanctions and by self-regulation."[67]

Even if attorney ads <u>were</u> in bad taste despite self-regulations, ethics codes and state laws, this worst-case scenario <u>still</u> doesn't justify overly broad limits on Constitutional rights. According to the Supreme Court in the Carey v Population Services International case; "The fact that protected speech might be offensive to some does not justify its suppression."[68]

Brill, in 1984, reasoned similarly; "Marketing is simply the process by which sellers communicate with buyers in a way that makes the market work efficiently. What is undignified is hiring a PR firm to get your name in the paper when you don't deserve

the attention, or touting yourself to a client when you don't have the skill to serve him."[69] But, Brill continued, although a few are tempted by such tactics, such behavior rarely persists or succeeds; "But that's not likely to work in the long run, and it shouldn't taint the whole process."[70]

Caveats

We have learned that there are a number of safe conclusions about legal advertising. Few lawyers take advantage of their opportunity to advertise, although it would benefit them, their profession, and consumers. One thing is absolutely certain -- legal advertising works. There are at least two Constitutional justifications for allowing unrestricted legal advertising: the First Amendment's protection for freedom of speech and the right to counsel contained in the Sixth Amendment. Finally, fears about unprofessional advertising should not deter legal advertising for a variety of reasons.

Still, these conclusions must be qualified somewhat. There are at least three qualifications which must be expressed regarding these research conclusions. These caveats are not complete retractions of the research findings, but they represent an attempt to keep things in perspective.

First, caution is warranted due to the recency of issues and cases involved. Only a decade has passed since the Bates decision changed the rules of legal advertising in 1977. Because so little time has elapsed there have been relatively few clarifying and extending cases, and insufficient time for comprehensive analysis.

A second qualification stems from careless scholarship. Numerous authors have confused terms like public relations, advertising, marketing, and promotion. As a result of ill-advised vocabulary choices, what one author terms marketing might well be labeled as advertising or public relations by another analyst.

A final caveat is related to the first. This essay is the first report from an ongoing research project. These are

initial, and therefore tentative, conclusions which later research might confirm, contradict or leave alone. Scholarship requires that predictions be made and solid conclusions be advanced, but there must remain some flexibility to accommodate the dynamics of research and analysis.

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2. For instance, some contend that restrictions are greater since the Bates decision sought the opposite effect in 1977. Andrews concluded: "However, many of these state rules prohibit lawyers from communicating the type of information that the Bates court (and various public surveys) found is most needed by the public. In addition, some state rules prohibit lawyers from using these particular advertising techniques that may be most effective..." See Lori B. Andrews, "Lawyer Advertising And The First Amendment," American Bar Foundation Research Journal 1981: 967, volume 96, number 4.

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28. "Lawyer Ads Yield $8 Per Dollar Spent: Survey," American Bar Association Journal, (June, 1980), volume 66, p 705.

29. "Lawyer Ads Yield $8 Per Dollar Spent: Survey," p 705.

30. "Lawyer Ads Yield $8 Per Dollar Spent: Survey," p 705.

31. The Research Group, p 13.

32. B. Kimball Baker, "You Can Advertise Now - But Should You?" Barrister, (Summer, 1981), volume 8, number 3, p 16.

33. Baker, p 16.

34. The Public Awareness Committee of the Maryland State Bar Association, The Case For Paid Advertising.

35. Chester N. Mitchell, "The Impact, Regulation and Efficacy of Lawyer Advertising," Osgoode Hall Law Journal, (March, 1982), volume 20, p 133.

36. Goldstein, pp 235-6.

37. Goldstein, p 236.

38. Goldstein, p 236.

39. The television advertising start-up cost was $150,000, and a public opinion survey cost another $25,000. After those expenditures the $10,000 monthly expense seems inconsequential. See Middleton, p 894.

40. Middleton, p 894.

41. Middleton, p 897.

42. Middleton, p 897.

43. Brill, p 10.

44. There are other issues involved, of course, but these are the main ones. One might also discuss application of Constitutional protections to the states through the 14th Amendment, for example.

45. 433 U.S. at 384.

46. Andrews, p 971.

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54. Greenwald, p 227.

55. Presto, citing 433 U.S. at 366.

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66. Andrews, p 976.

67. Mitchell, pp 129-9.

68. Andrews, p 974, citing 431 U.S. 701, (1977).

69. Brill, p 13.

70. Brill, p 13.